Christopher Graham
Information Commissioner
Information Commissioner's Office
Wycliffe House Water Lane
Wilmslow
Cheshire
SK9 5AF

23rd December 2015

Dear Mr. Graham,

Data sharing to third countries post ECJ Decision in *Maximillian Schrems v Data Protection Commissioner 2015 ("Schrems")*

The Association for Financial Markets in Europe and the British Bankers' Association[1] write to stress the importance of achieving an early resolution of the problems generated by the recent *Schrems* judgment.

Potential impacts of Schrems and the need to address them

Whilst our members are not *directly* affected by the CJEU's judgment in *Schrems*, as financial services firms are not reliant upon the Safe Harbor provisions for effecting personal data transfers to the USA, the judgment does have implications for our Members' businesses and their customers and employees.

Specifically, the financial services sector: a) engages US-based vendors to provide services which may involve the transfer of personal data of both customers and employees to the USA, b) is reliant on international markets, platforms, and intermediaries who depend upon US-based vendors and c) depends upon payment systems which, to some extent, rely on Safe Harbor.

Many firms rely on distributed information technology infrastructure to provide resilient and reliable systems that are necessary to support the processing of financial transactions, including those systems supporting payments, trading platforms, and human resources' processes (for example compensation, annual reviews, travel and the like). Such service providers have historically relied upon the Safe Harbor for compliant transfer of personal data to the USA and for a variety of legal and technical reasons may also be unable to use other transfer mechanisms.

[1] The Association for Financial Markets in Europe (AFME) represents a broad range of European and global participants in the wholesale financial markets. Its members comprise pan-EU and global banks as well as key regional banks and other financial institutions. AFME advocates stable, competitive and sustainable European financial markets, which support economic growth and benefit society. AFME is listed on the EU Transparency Register, under ID number 65110063986-76.

The BBA is the leading trade association for the UK banking sector with 200 member banks headquartered in over 50 countries with operations in 180 jurisdictions worldwide. Eighty per cent of global systemically important banks are members of the BBA. As the representative of the world's largest international banking cluster the BBA is the voice of UK banking. The BBA is listed on the EU Transparency Register, under ID number 5897733662-75.

We note that whilst the Article 29 Working Party and your own office have both indicated that firms may, for the time being, rely upon alternative data transfer mechanisms including standard contractual clauses, binding corporate rules and consent, it has also been stated that the *Schrems* judgment may have implications for future use of these mechanisms. Although we take the view that these are valid transfer tools, we note that the above viewpoint is also largely shared by the Conference of the Data Protection Commissioners of the German Federation and the German States. Additionally, while Directive 95/46/EC provides a range of other derogations that firms can rely upon to transfer data, there may be an issue as to the extent to which those derogations can apply to distributed and immediately available information technology systems which are commonplace in the financial services sector. In any event, these alternative measures take significant time to be implemented.

The foregoing has generated considerable legal uncertainty for firms operating across Member States, by effectively unravelling well established commercial relationships which, to date, have satisfied European requirements and been developed over the last 10-15 years. Consequently it is difficult to plan and implement appropriate responses in the absence of a legal framework to support accountability for data transfers. Moreover, the above statements from data protection regulators are also negatively impacting the goals of the Single Digital Market, as divergent messages are being communicated on a materially important trans-Atlantic and international issue.

The timetable for new arrangements with customers and vendors

The Article 29 Working Party stated that if *by the end of January 2016* no appropriate solution is found, and subject to its assessment of alternative transfer tools, it is committed to taking action, which may include co-ordinated *enforcement action*. However the reality is that changing arrangements from Safe Harbor to other mechanisms is a complex, lengthy process that requires considerable planning and prioritisation. This will be even more challenging for those firms who do not currently rely heavily on the use of standard contractual clauses but operate across multiple EU Member States, each with different data protection frameworks. As it is not unusual for firms to have hundreds of vendors, firms will need to put into place many paper contracts with each data exporter and data importer whilst also drafting and agreeing potentially hundreds of amendments to Master Agreements and Work Orders to cover the variety of differing data sharing arrangements and services that firms make use of. Resolving these issues will ultimately take time, potentially resulting in the disruption of services to customers.

Solutions

Ultimately, the key solution to the above is for the prompt agreement and publication of the Safe Harbor II, and ultimately for the adoption of a consistent approach to the implementation of the *Schrems* judgment across the EU (through e.g. collaboration by the European Commission with the Article 29 Working Party on the production of any analysis of the impact of the *Schrems* judgment).

Given however the difficulties outlined above, we would also request that serious consideration is given to providing an adequate transition period in your own approach to enforcement. Specifically we believe that firms should at *a minimum*, be given a period of at least 6 months (from the date on which any joint analysis of the *Schrems* judgment by the European Commission/Article 29 Working Party is published) in which to move to alternative transfer mechanisms.

We would also urge you to ensure that your approach to the implementation of the General Data Protection Regulation will deliver a regulation that provides legally certain and predictable data transfer mechanisms.

Finally, we would be pleased, of course, to discuss the issues covered in this letter or to provide further information about any of the matters which our members have raised if that would be helpful.

Yours sincerely,

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Cc: Isabelle Falque-Pierrotin, Chairman of the Article 29 Working Party
Cc: Baroness Neville-Rolfe, DBE CMG, Parliamentary Under Secretary of State and Minister for Intellectual Property